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Governing Juridical Sex: Gender Recognition and the Biopolitics of Trans Sterilisation in Finland

Abstract: In many countries, compulsory sterilisation is still a precondition for amending juridical sex. Drawing on feminist and queer debates on the entanglement of recognition with governmentalisation, this article moves beyond a human rights frame to examine how struggles for legal gender recognition are bound up with the production and discipline of trans subjectivities, bodies and relationships. It argues that rights and recognition may not only reinscribe regulation, but they also are a means of rendering trans subjects governable. By theorising gender identity as a biopolitical discourse that produces trans subjects, the article genealogically examines the problematisation of ‘gender identity’ in Finnish welfare population governance practices leading up to the 2003 Finnish gender recognition law. The analysis demonstrates how the discourse of ‘equality’ was key for producing a clearly defined trans population that could be identified, assessed, and hence, governed. While the sterilisation requirement was justified as a replacement for former castration laws which had been used by MtF transsexuals to access genital surgery, it also acted as a disciplinary technology to neutralise the alleged threats to normative forms of kinship that could be produced through gender recognition. Finally, the article considers points of resistance and avenues for further research.

Recent years have seen an increased recognition of trans rights in Europe. One prominent area of focus has been the question of compulsory sterilisation as a precondition for legal gender recognition. Since 2014, it has been abolished by at least ten countries¹ and in April 2017 the European Court of Human Rights found sterilisation requirements in French legal gender recognition laws to violate the right to private and family life.² The ways in which gender recognition is governed are therefore likely to continue to change in the coming years. In the midst of such rapid changes, however, it is possible to lose sight of the workings of power/knowledge that underpin trans rights. Compulsory sterilisation was often introduced as a part of gender recognition law, indicating that seemingly emancipatory demands for trans rights and recognition are easily entangled with disciplinary rationalities and practices. The overall aim of this article is therefore to examine and problematise the entanglement of trans rights struggles with governmentalisation.

Although gender recognition law has long interested legal scholars (e.g. Sharpe 2007, Whittle and Turner 2007), there is little research in political science on the complex power relations involved in the governance of gender recognition in Europe. The paradoxes of political recognition in liberal modernity, however, are familiar dilemmas in feminist, queer and trans politics. While the state's conferral of rights to various groups is an important political goal, Dean Spade (2015, 73-4) has recently echoed queer and feminist scholars (Brown 2000;

¹ These are Croatia, Denmark, France, Italy, Luxemburg, the Netherlands, Norway and Ukraine. The removal of the sterilisation requirement has often been accompanied by other legal changes, such as the extension of equality and anti-discrimination legislation to include gender identity, and self-determination. Denmark was the first country to pass a law based on self-determination in 2014, followed by Malta (2015), Ireland (2015) and Norway (2016).

² The ruling is only binding for France, but it is significant for all Council of Europe members because the ruling established a normative precedent implicating, for the first time, that those twenty European countries where sterilisation remains a prerequisite to legal gender recognition violate the European Convention on Human Rights. According to Transgender Europe (2017), in April 2017 these countries were Armenia, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Finland, Georgia, Greece, Latvia, Lithuania, Luxembourg, Montenegro, Romania, Russia, Serbia, Slovakia, Slovenia, Switzerland, Turkey and Ukraine.

Warner 1999) in arguing that rights do not necessarily guarantee trans people an end to day-to-day political, social and economic discrimination and violence. This is not only because oppressive norms continue to circulate despite the legal recognition of protected characteristics, but also because rights can also act as a means of normalisation and control. As Michel Foucault (2007, 48) argues, disciplinary practices in liberal societies tend to operate in a double bind with discourses of freedom. Wendy Brown elaborates that even as the demand for freedoms and rights may offer protection from some of the harms that are tied to one's designation as a given subject, 'it reinscribes the designation as it protects us, and thus enables our further regulation through that designation' (Brown 2000, 232). The queer critique of equal marriage rights for same-sex couples is a case in point: by gaining the right to the institution of marriage as gay people, same-sex relationships also become reshaped and normalised by the regulatory conventions and practices that historically underpin the institution of marriage (Warner 1999). Thus, by appealing to rights for emancipation, one can end up 'strengthening... the operative terms of the master discourse' (Golder 2015, 160) rather than weakening it. To take this argument further, I suggest that rights may not only reinscribe regulatory discourses, but that they are also a means of producing subjects and rendering them *governable*. Recognisability, I argue, translates into governability. By therefore overlooking the 'positive' technologies of power that produce and confer trans rights of recognition, we fail to examine how trans struggles for recognition can also be entangled with disciplinary rationalities and practices.

In order to better understand what is at stake in the struggle for trans rights, this article examines the formation of Finland's gender recognition law, the Finnish Act on Legal Confirmation of

the Sex of Transsexuals³ (563/2002, hereafter the Trans Law⁴). The Finnish Parliament passed its first gender recognition law in 2002, which came into force in 2003. It stipulated that one of the conditions for recognition was for applicants to present a certificate of sterility. As a certificate of sterility can normally be issued to trans people undergoing transition after six to twelve months of hormone treatment, the clause effectively compels trans people to either undergo hormone treatment⁵ or be sterilised through a surgical procedure. The Finnish case is an interesting one because the Trans Law was passed during a time of significant breakthroughs for LGBT rights in Europe (Ayoub and Paternotte 2014, 2-3). In Finland, the legal recognition of same-sex civil partnerships came into force in 2002, and discrimination based on sexual orientation was prohibited in the Non-Discrimination Act of 2004, which was amended to include discrimination based on gender identity or expression in 2005. At the time of its passage in 2002, the Trans Law, too, was considered one of the most progressive in Europe because, for example, it did not compel applicants to have genital surgery. The Trans Law can be seen as a part of a progressive tide in Finnish LGBT rights because it was the first piece of legislation that guaranteed trans people the right to modify their juridical sex. In recent years, however, the law's sterilisation requirement has widely come to be seen as incompatible with Finland's image as a progressive Nordic country in the area of equality and human rights (Holli 2003).⁶ LGBT and human rights groups such as Amnesty International Finland, the Finnish League for Human Rights, Rainbow Families, Seta and Trasek are currently campaigning to

³ The law, *Laki transseksuaalin sukupuolen vahvistamisesta* (562/2002), can alternatively be translated with reference to 'gender' rather than 'sex' as 'Act on the Legal Confirmation of the Gender of Transsexuals' because the Finnish term for sex, *sukupuoli*, is also used to refer to gender in the Finnish language. In 2002, what legislators sought to alter was the individual's legal sex status, and therefore I feel this translation better reflects the 'politics' of both the terminology and practice instituted at the time.

⁴ 'Trans Law' is a translation of its Finnish moniker, *translaki*.

⁵ Sterility caused by hormone treatment may be reversible if treatment is discontinued.

⁶ Given that homosexuality was not decriminalised until 1971 and declassified as a mental illness in 1981, the narrative of Finnish progressiveness in the area of LGBT rights is easily challenged.

abolish the Law's requirements for sterilisation, psychiatric diagnosis, and medical intervention.

In the interest of examining the relationship the struggle for rights, recognition and equality on the one hand, and discipline and governmentality on the other, this article examines the Finnish case to illustrate state's struggle to make trans populations *governable* in the two decades leading up to the 2003 Trans Law in Finland. Specifically, the analysis proceeds by asking through what series of governmental problematisations were trans bodies rendered objects of sterilisation, and how was trans subjectivity produced and disciplined in the process? To answer these questions, the article engages with Michel Foucault's notion of biopolitics and conducts a genealogical analysis of Finnish state discourses and practices on the problem of how to govern juridical sex. I argue that compulsory sterilisation was one of the means by which the Finnish state sought to make trans subjects governable while granting them legal gender recognition. The core analysis is based on a series of governmental documentation produced in 2001-2003 around the 2003 Trans Law. This consists of the Government Bill (HE 56/2001 vp), the statements of the Social Affairs and Health and Legal Affairs Committees, including the testimonies of expert advisers, and the transcripts of the parliamentary debate around the proposed law. I also conducted interviews with five former and current Finnish LGBT and human rights professionals in order to deepen my knowledge of the history and political context of the Trans Law.⁷

A note on language is also warranted. The Finnish language does not have a separate word for 'gender' but rather the term *sukupuoli* is used to refer to all definitions of sex or gender –

⁷ I do not quote from the interviews, but they were invaluable for building my knowledge about the history of gender recognition in Finland and the policy process around the 2003 Trans Law.

biological, socially constructed, and identitarian. For this reason, I have often translated *sukupuoli* as ‘sex’ rather than ‘gender’ when the ontological referent of *sukupuoli* is unclear, for instance when referring to ‘legal sex’ or ‘juridical sex’ (*juridinen sukupuoli*). I therefore give translational and analytical precedence to the rationality or knowledge-order that is expressed, rather than the terms used. However, where it is clear from the context of a text that reference is being made to *sukupuoli-identiteetti*, the equivalent of ‘gender identity,’ or to self-identification or sense of self, it has been translated as ‘gender’ or ‘gender identity’ for the sake of clarity. Finally, it should be noted that when the 2003 Trans Law was passed, the legislation referred to ‘transsexuals’ (*transseksuaali*). In a 2016 amendment, references to ‘transsexuals’ were updated to ‘transgender’ (*transsukupuolinen*) – a reflection of the historically contingent nature of the categories of trans subjectivity also in the Finnish language (Leino 2016, 452-6; Valentine 2007).

Juridical Sex and the Biopolitics of ‘Gender’

As an increasingly mobilised analytical concept in transgender studies (Aizura 2006; Beauchamp 2013; Spade 2015; Stryker 2014), Foucault’s notion of biopolitics has recently informed emerging studies on the compulsory sterilisation of trans people. For instance, in a study of the former Gender Identity Act in Argentina, Martin De Mauro Rucovsky has argued that compulsory sterilisation ‘was a safeguard against the potential risk of spreading, reproduction and increase of the trans* demographic rate’ towards a ‘shared future where monsters would not multiply’ (De Mauro Rucovsky 2015, 16). De Mauro Rucovsky therefore frames sterilisation as a thanatopolitical practice through which the trans body is excluded from the groups of citizens deemed worthy of reproducing. By compelling trans people to undergo sterilisation, the state enforces an anticipatory suppression of the social and biological genesis

of trans life – of both trans reproduction and trans bio-parenthood. Going further, Anna Carastathis has argued that it is a form of genocide where ‘trans people are systematically written out of legal existence precisely through the concepts which define “the human” in cisgenderist, heteronormative and bio/logical terms’ (2015, 81). These formulations emphasise the violent nature of the sterilisation requirement and analyse the nature of its exclusionary logic.

These analyses, however, overlook the question of legal gender recognition to which the sterilisation requirements are paradoxically attached. Rather than writing trans people out of existence, compulsory sterilisation appears precisely as a part of legislation that juridically recognises the existence of trans people and their right to alter their official identity records. Once this is taken into account, a more complex picture of the contemporary governance of trans lives emerges, one where sterilisation is not simply a mode of exclusion or extermination, but rather a disciplinary condition for inclusion into political existence and life. This requires particular understanding of law as a strategic site of power, as well as of sex/gender as one of its products.

First, while law can be seen as enacting thanatopolitical inclusions and exclusions of life and death based on population categories (Mbembe and Meintjes 2003, 16-7), it can also be seen as a site of veridiction that is involved in the contingent production of those categories as ‘true’. By site of veridiction, I mean ‘a site of the formation of truth’ (Foucault 2008, 30) where for instance the apparatus of sex is deployed and becomes translated into regimes of power, knowledge, and government. Thus, rather than seeing law as an exclusionary form of power that produces norms of sex/gender by ‘regulat[ing] political life in purely negative terms – that is, through the limitation, prohibition, regulation, control, and even “protection” of individuals’

(Butler 1999, 4), the juridical can also be understood as something more unresolved, responsive, and open (Golder and Fitzpatrick 2009, 82). This approach enables an analytics of how ‘the phenomena, techniques, and procedures of power come into play at the lowest levels’ (Foucault 2003, 30). Law may be invoked to respond, in opposition or collaboration, to productions of truth elsewhere, it may impact other forms of power such as psychiatric power by sanctioning its role in public hygiene and order (Golder and Fitzpatrick 2009, 27), and it is also a site for making truth claims about social life (Smart 1989, 13).

The ‘sex’ produced by law is what I will refer to here as ‘juridical sex,’ and can exist in harmony, interaction or tension with other discourses of ‘true’ sex. According to Foucault, in modernity we are never dealing with *a* discourse on sex, but always ‘a multiplicity of discourses produced by a whole series of mechanisms operating in different institutions’ (Foucault 1981, 33). These discourses are produced in both scientific contexts, for instance in demography, biology, medicine and psychiatry, as well as through confessions of the self, stemming from ‘the movement by which each individual was set to the task of recounting his own sex’ (Foucault 1981, 33-4). As Foucault recounts in the *Herculine Barbin* volume, the idea that everyone must have ‘one and only one’ (1980, viii) true and determinate sex was the gradual result of biological theories of sexuality, administrative control, and juridical conceptions of the individual. In *Will to Knowledge*, Foucault elaborates that sex is both a product and target of power. The emergence of sexuality as a discourse of truth gave rise not only to new forms of medical and psychological interventions, but also to new governmental techniques of assessment, surveillance, and intervention designed to regulate a society’s strength and vigour (Foucault 1981, 145-6). By governing sex, it was possible to manage both broader population patterns objectified by statistics as well as the reproductive behaviour of individual bodies through the production of psychiatric, medical and bourgeois moral

knowledge. New subjectivities such as the ‘homosexual,’ ‘pervert,’ ‘masturbating child,’ and the ‘hysteric’ were crafted as types requiring different forms of regulation and intervention (Foucault 1981, 104-5). The nuclear family in particular was deployed as the locus of power through which hygienic, psychological and pedagogical norms were transmitted, ensuring the social and economic discipline of life processes (Donzelot 1979, 45, 227).

In short, a whole new apparatus of power was built around the production of ‘sex’ and the desire for it – ‘the desire to have it, to have access to it, to discover it, to liberate it, to articulate in discourse, to formulate it in truth’ (Foucault 1981, 156). Moreover, Foucault argued that ‘it is this desirability that makes us think we are affirming the rights of our sex against all power, when in fact we are fastened to the deployment of sexuality’ (1981, 157). In other words, the emancipatory desire to challenge the state to enshrine rights of sex in law is only possible because sex has been forged into a true discourse in the first place.

Just as the regulation of sexuality/sex through psychiatric and juridical practices was possible through the production of subjects in possession of a ‘true’ sexuality that could be discovered, analysed and controlled, ‘gender identity’ can also be approached as a biopolitical discourse. As transgender studies scholars have shown, the idea of gender is a historical formation and ‘organising principle’ (Preciado 2013, 111) that is not neutral, ahistorical, or universal (Valentine 2007, 5, 19). It can be traced back to 1950s and 1960s psychiatry, where it emerged through the US psychiatric problematisation of the psychosexual development of intersex and transsexual patients (Germon 2008; Hausman 1995; Meyerowitz 2002). As Jemima Repo (2015) has argued, by introducing the idea of gender as a separated order of knowledge from sex, with its constituent aspects of ‘gender roles’ and ‘gender identity,’ psychiatrists John Money and Robert Stoller produced new areas of sexed life that could be examined, discovered,

ordered, and consequently, regulated. In practice this led to the production of a series of psychological and surgical protocols in order to organise and normalise deviance, for instance through the ‘normalisation’ of ambiguous bodies through medical interventions to make them ‘fit’ the repronormative order of postwar American capitalist life (see also Irni 2016, 523).

Like sex, ‘gender’ and its associated categories of ‘gender role’ and ‘gender identity’ gave rise to new subjectivities that emerged through a circuitous convergence between psychiatric and medical discourse on the one hand, and discourses of the self-produced by trans subjects on the other. In psychiatry, there were efforts to scientifically differentiate and classify trans categories such as ‘transsexual’ and ‘transvestite,’ and to formalise them into diagnostic categories, eventually resulting in the entry of Gender Identity Disorder in Children (GIDC) as a diagnosis in the *Diagnostic and Statistical Manual of Mental Disorders III* in 1980 (Bryant 2006; Repo 2015, 72).⁸ At the same time, people who self-identified as homosexuals, transvestites, and transsexuals sought to make sense of how they differ from each other with the aim of making themselves intelligible to others and to make rights claims in both medicine, law and public discourse (Meyerowitz 2002, 176-7). Thus, to paraphrase Aren Aizura quoting Foucault, only upon the biopolitical deployment of ‘gender identity’ did the transsexual ‘gain the status of a personage with a past, a case history and childhood’ (Foucault in Aizura 2006, 292). From this perspective, gender itself, like sexuality, can be regarded as an apparatus of biopower: it encapsulates a new mode of truth and knowledge through which the sexual order can be newly deciphered and governed – no longer simply through ‘sex,’ but also through and in conjunction with ‘gender’ (Repo 2015). As the passing of gender recognition laws demonstrates, the governmentalisation of gender identity discourse also has the ability to

⁸ The diagnosis of Gender Identity Disorder in Adolescents or Adults (GIDAA) was added to the DSM-IV published in 2000. Both GIDC and GIDAA were replaced by Gender Dysphoria (GD) diagnosis in DSM-V in 2013.

challenge conventional institutions of juridical sex classification. Gender identity has therefore become a question of biopolitical governance. To illustrate how this occurs in practice, I now turn to the Finnish case.

Problematising Personal Identity Codes in Finnish Welfare Biopolitics

State-authorised documents such as birth certificates, passports, and driver's licenses form the main administrative means through which juridical sex is inscribed and governed. In Finland, juridical sex is codified through Personal Identity Codes (PICs), a unique number series assigned to each individual and a key aspect of Finnish welfare state biopolitics. In this section I examine how the fixity of the sex variable in Finnish PICs was destabilised with the emergence of the trans subject, followed by an analysis of the governmental discourses calling for the administration of sex to be brought under new forms of legally sanctioned expertise and control.

The question of legal sex in Finland is inextricable from this centralised mode of population data collection and governance. PICs are a key biopolitical technology of Finnish welfare governmentality. First introduced as Social Security Numbers in 1964, they were renamed PICs under the 1972 health care reforms that rolled out affordable healthcare services in all municipalities. The 1960s and 1970s were key decades of the institutionalisation of welfare biopolitics in Finland, underpinned by the idea that each citizen possessed an inalienable right to health care (Helén and Jauho 2003, 24). The PIC institutionalises the biopolitical demarcation of who belongs to the nation-state and who does not, and erects welfare structures and practices accordingly to ensure the vitality of the political subject. The PICs allow for the surveillance and regulation of individual health and social order through the collection of a

detailed set of personal data from each individual, including name, address, citizenship, native language, family relations, date of birth and death, and religion. The information is stored in a national computerised data register, the Population Register Centre (*Väestörekisterikeskus*). It is used broadly across political, social, and economic life, for instance in elections, taxation, healthcare, judicial administration, and research: PICs are essential for the conduct of everyday life with businesses and private companies, for instance in order to open bank accounts, make telephone and electricity contracts, pay bills, make appointments, and buy prescription drugs. As such PICs are listed on all forms of Finnish personal identification, such as driver's licences and passports.

Because birth certificates are not issued in Finland, the PIC number is the only administrative record of a person's legal sex. It consists of eleven characters, of which the first six disclose date of birth (DDMMYY), followed by a character denoting century of birth (C), and four more characters (ZZZQ) of which the second last denotes sex (e.g. DDMMYYCZZZQ, whereby the last 'Z' signifies sex). It is odd for men and even for women. By including sex as a variable in the PIC, sex is affirmed as a central aspect of legal personhood, and therefore biopolitical regulation. The PIC sex variable affects the regulation of population in terms of the laws regulating names (which must reflect sex), right to marry (marriage was accessible only to heterosexual couples until 2017), the designation of motherhood and fatherhood, military service (compulsory for men), imprisonment (sex segregation), coercive measures (bodily examinations), and workplace regulations (regarding toilets and washrooms). In short, are PICs the prime mode of rendering the Finnish population calculable and therefore governable (Hacking 1982), because they enable the supervision, discipline and regulation of the (sexed) conduct of everyday personal, political, social, and economic life. Indeed, in Finland, a

perceived ‘wrong’ PIC can leave trans people vulnerable to exclusion, verbal, and even physical violence (Fogg Davis 2014, 46).

Until the 1980s, the PIC was largely taken for granted as a permanent, life-long personal identifier, reflecting the stability ascribed to the biological ‘facts’ of individuals, such as birth date and sex. The agency of trans people seeking new PICs, however, challenged this assumption. As I explain below, the regulation of juridical sex was framed by government institutions as a population data management problem composed of the lack of proper governmental practices and, hence, a lack of control over trans populations. The construction of the ‘transsexual’ as the subject that required regulation, in turn, shaped definition of what needed to be controlled, and how.

The Local Register Offices were first granted formal authority to grant new PICs in 1988, after a case brought to the Supreme Administrative Court (KHO 1988-A-46) ruled in favour of allowing the Population Register Centre to amend the number signifying sex in PICs. There were, however, no official guidelines by which administrators should assess applications for a PIC amendment, so any changes were made at the arbitrary discretion of Registry Offices. This does not mean that there had not been any efforts to introduce guidelines. In 1987, the Finnish Medical Board (*Lääkintöhallitus*) approached the Social and Health Ministry to establish a working group to draft legislation proposing juridical criteria for amending legal sex. Together they proposed that the person must have ‘felt that they belonged since youth to the sex opposite to that registered,’ that they be at least twenty years old, unmarried, childless, and sterilised or otherwise infertile. Following expert statements, the proposal collapsed due to criticism of the requirement that applicants should be unmarried and childlessness, and for proposing that access to hormone treatments should be licensed. In a 2000 memo commenting on the 1987

proposal, the Social and Health Ministry stated that ‘making hormone treatment subject to license was no expedient because it could for instance lead to the street trade of drugs and consequently an increase in health risks’ (Social and Health Ministry 2000, 16). In addition to the biopolitical concern for the health of the population, this statement reflects a state anxiety about sex fluidity linked to sex hormones as substances that enable the chemical modification of sex (Beauchamp 2012, 57; Irni 2016, 523).

As the medical and psychiatric treatment protocols for trans patients developed in the 1990s, some Finnish Local Registry Offices began to demand a psychiatric diagnosis of transsexualism or a statement from the National Authority on Medicolegal Affairs before granting a new PIC. Thus, the anxiety over how to legally control sex-based population data was re-articulated when in 1992 the Population Registry Centre approached the Ministry for Social Affairs and Health for instructions on assessing applications for legal sex confirmation. The Population Registry Centre argued that ‘the task of defining sex does not belong to Population Registry officials, neither do they have the expertise to resolve on which basis and at which point a transsexual can be given a new PIC’ (Väestörekisterikeskus 2002). By formulating the problem of ‘true sex’ as a matter of expertise, the Population Registry Centre problematised the issue of who gets to define what sex ‘is’, and that particular kinds of expertise were necessary to do so. In 1998, the Population Registry Centre again stated that ‘the basis on which the PIC of a transsexual can be changed varies and the issue is considered problematic in many local registry offices’ (HE 56/2001, 12). The Ministry of the Interior, to which the Centre reported, stated that it too felt that ‘in order to clarify the current uncertain situation, the requirements and procedures for changing sex should be legislated in a sufficiently detailed manner’ (HE 56/2001, 12). The same discourse persisted in its 2002 statement to the Social and Health Committee commenting on the 2001 Bill: ‘the local registry offices gave diverging

interpretations of the basis of which a transsexual's PIC can be changed. In the Population Registry Centre's view this is because there is no regulation on the requirements for changing the PIC' (Väestörekisterikeskus 2002). The question of how to govern sex-based data therefore became a matter of how to regulate sex 'crossings' by producing a specific, fixed 'interpretation' of 'true sex' that stabilised trans personhood and rendered it governable.

Producing and Governing Trans Populations

Although attempts to introduce guidelines for trans PIC management in the 1980s and early 1990s collapsed, they set into motion the governmental problematisation of the best way to regulate trans personhood. The figure of the 'transsexual,' understood in government documents as an individual who 'changed' from one sex to its 'opposite,' was defined as the subject that required governing. When the Bill for the 2003 Trans Law was being prepared, the discussion between the Population Registry Centre and the Ministry for Social Affairs and Health focused on the problem of how to define the point at which someone could be considered to have ceased to exist as one sex and become the other. In this section I examine this endeavour to redefine the juridical parameters of 'true sex' as a part of a broader attempt to make trans personhood intelligible and, hence, governable under the Finnish welfare state. In the process, the trans subject became produced as a fixed, intelligible political subject that could be objectified by the medical establishment, Local Registry Offices, and the central government. Underpinning this governmentalisation in the Trans Law was a discourse of equality.

When the Finnish Government produced the Trans Law Bill in 2001, a major discursive shift had occurred. In section 2.3 of the Government Bill on the 'Assessment of the Current

Situation,’ the Bill reframed the core issue of ‘too little’ governance that circulated in the 1980s and 1990s into a matter of ‘unequal’ governance.’ According to the Bill, the problem was that transsexuals ‘are not treated in an equal way when they apply for PIC alteration’ (HE 56/2001 vp, 10) because ‘the law as it stands does not state the terms by which an individual can be seen to belong to the sex opposite to their biological sex’ (HE 56/2001 vp, 10). In other words, Local Registry Offices could not guarantee ‘equal treatment’ of trans citizens applying for a PIC alteration because they lacked the criteria to assess who could ‘truly’ be considered to belong to a given sex. Thus, the documentation that Local Registry Offices requested from trans applicants varied across municipalities, making the processes easier for some - and more difficult for others. The proposal then cited Section 6 of the Constitution of Finland, which decrees that ‘people are equal before the law and no one may, without an acceptable reason, be treated differently from other persons on the grounds of sex, health or another reason that concerns his or her person.’ Thus, the proposal argued, ‘the changing of the PIC of a transsexual should be laid down in law in a sufficiently precise and well-defined manner’ in order to ensure equal treatment. Rather than seeing this statement of the right to equal treatment as a self-evident legal or moral imperative (Zivi 2014, 291), however, I suggest approaching equality discourse as a governmental ‘technology for the regulation of difference’ (Repo 2016, 322).

Like rights discourse (McNay 2009, 70; Zivi 2012, 19), under liberal governmentality, equality discourse often assumes the existence of a fixed and universal group experience on the basis of which claims to equality or rights are made. In order to govern the rights and equalities of populations, specific attributes or characteristics of the referent subjects must be defined so as to be made intelligible in the eyes of the law and by defining those attributes, ‘the law engages in the discursive “production” of its subjects’ (Dreyfus 2012, 36). Equality discourse, like rights discourse, is therefore also *productive* of sex, sexual and gender subjectivities. This

production, however, ‘entails the establishment of limitations, controls, forms of coercion, and obligations relying on threats, etcetera’ (Foucault 2008, 64) in order to ensure that the freedom guaranteed does not endanger the wider population and that the individuals or groups in question ‘exercise their liberty in a disciplined and responsible manner’ (Dean 1999, 117). Discipline, as a means of securing rights and freedoms, is therefore integral to the realisation of liberal governmentality (Foucault 2008, 65).

By extending this critique of freedom and rights discourse to equality, it becomes possible to examine equality as a key discourse enabling of the governmentalisation of trans personhood. First, the discourse of equality produced a transsexual population that was being treated unequally. That population therefore needed to be clearly defined to ensure that all Local Registry Offices assessed all gender recognition applications with the same criteria. This required a more disciplined production of the transsexual subject, and the centralisation of its means of regulation.

On the first page of the twenty-two-page Government Bill (HE 56/2001 vp) presented in 2001, it was stated that ‘the law would prescribe the preconditions by which a transsexual person’s juridical sex can be changed to correspond to their own understanding of their sex’ (HE 56/2001 vp, 1). It clarified that the term transsexual ‘refers to a person, who feels they belong to the sex opposite to their biological sex’ and elaborated that ‘medically transsexuality is nowadays considered to be a gender identity disorder’ (*sukupuoli-identiteetin häiriö*), which was a ‘permanent state’. Legal scholars have argued that the political-juridical recognition of ‘gender identity’ in the UK Gender Recognition Act destabilised the sexed body as the sole basis for establishing juridical sex (Sharpe 2007, Whittle and Turner 2007). This also resonates with the Finnish case. In addition, I argue that the establishment of ‘gender identity’ as a new

discourse of truth also involves a movement of re-stabilisation. In Finland, the government granted psychiatric authorities the jurisdiction to define ‘when a person’s transition has progressed to the point that their PIC can be changed to correspond to their new sex’ (HE 56/2001 vp, 12). ‘Gender identity’ would be treated as a medical ‘fact’ that had the potential to challenge declared birth sex, but this was only possible through psychiatric assessment and confirmation of a person’s condition as ‘permanent’ and hence fixed and legitimate. Specifically, the Trans Law demanded that applicants:

- 1) Submit medical statement, authenticated by two psychiatrists, confirming that the person ‘feels like they permanently belong to the opposite sex and lives in the sex role of the opposite sex,’ (HE 56/2001 vp, 1) and that they are sterilised or otherwise infertile;
- 2) Be at least eighteen years of age;
- 3) Neither married nor in a registered partnership⁹;
- 4) A Finnish citizen or resident of Finland.

To obtain the medical statement, individuals must pass a diagnostic period lasting up to twelve months or longer, followed by ‘real life test’ during which they must live according to their preferred identity for twelve months. Government Bill stated that the medical assessment was necessary in order to obtain evidence that the applicant ‘feels that they permanently belong to the opposite sex and that they live according to this sex role’ (HE 56/2001 vp, 13). Indeed, what the law produced were regulatory practices targeted at disciplining trans bodies and narratives into discourses of permanence. To provide this evidence, doctors were to refer to the International Classification of Diseases (ICD-10) diagnostic criteria for transsexualism.

⁹ If however the applicant was married or in a registered partnership, the partnership would be changed to a marriage and the marriage to a partnership. This clause was overturned in 2016 when same-sex marriage was allowed.

Although the law did not make hormonal and surgical treatment compulsory due to the health risks they posed for some individuals, it was stated that otherwise ‘the desire for surgical treatment was a part of the transsexual diagnosis’ (HE 56/2001 vp, 13). An expressed desire for hormonal and surgical treatment, and the ability to successfully complete the ‘real life test’ as the ‘opposite sex’ was therefore a means to assess the truth and permanence of a person’s sex. The age limit was also reflective of the anxiety around permanence, as ‘it was not yet possible to diagnose permanent transsexualism in childhood’ (HE 56/2001 vp, 13). Similarly, the sterilisation requirement also aimed to enforce a permanent change to bodily capacities, compelling individuals to show conviction and dedication to stick with their new juridical sex. The law produced a particular understanding of the trans subject as a transsexual around which it produced a regulatory apparatus targeted at disciplining trans bodies and narratives into fixed and permanent states. Toby Beauchamp suggests that medical transition is ‘one method by which the state attempts to regulate movement of bodies and identities’ in order to control the ‘dangerous’ and uncontrolled fluidity that, for instance, the self-administration of hormones may unleash (Beauchamp 2013, 58). The normative pressure for trans people to undergo hormone therapy and/or sex reassignment surgery, even if they do not want to do so, reflects this imperative. The Trans Law can therefore be considered an attempt to ‘constrain gender flexibility and maintain the readability of trans bodies’ (Zullo 2015, 15) through normalising practices that produce a fixed, permanent, and governable trans person whose gender identity can be accordingly administered.

Finally, the Law may have realised its goal of producing transparent requirements that were universally applied to all trans people applying for a new PIC, but it also created a new centralised system for the recognition and regulation of juridical sex in the Finnish welfare state. Whereas previously one statement from an endocrinologist, or none at all, may have

sufficed for the Local Registry Office to grant a new PIC, now all trans people were subjected to even stricter criteria than they might have been earlier. The Trans Law therefore did not necessarily make it easier for some trans people to acquire a new PIC. Rather, the Law intensified and centralised the power over ‘true sex’. It shifted the authority to determine a person’s juridical sex entirely from the Local Registry Offices to psychiatrists in two centralised clinics that specialised in gender identity research, one in Helsinki and one in Tampere. Psychiatrists were no longer solely treating their patients who then applied for new PICs, but rather their protocols and testimonies became a part of the population administration process. In this context, their problem was not so much how to best treat their patients, but how to assess through specific diagnostic criteria, and with binding force, whether or not the individual before them was sufficiently “male” or “female” on the state’s terms to warrant a new PIC from the state. Rendering the trans subject governable therefore involved a biopolitical governmentalisation of psychiatric knowledge and practice, enabled through a discourse of equality.

Sterilisation: Permanence, Authenticity, and Kinship

In this section I finally turn to the compulsory sterilisation requirement of the Trans Law. Sterilisation is usually associated with what Foucault calls the ‘eugenic ordering of society’ (Foucault 1981, 149). Like other Nordic welfare societies, Finland introduced eugenic legislation in the pre-war period. Most notably, the 1935 Sterilisation Law enabled the forced and coerced sterilisation of the mentally disabled, mentally ill, epileptics, and sexual criminals (Hietala 1996, 218-9). Male sexual criminality was considered to be a male form of degeneration, possibly linked to boyhood ‘effeminacy’ (Honkasalo 2016, 3) that demanded neutralisation by castration, whereas sterilisation was mainly targeted at women to prevent

them from reproducing and spreading potentially ‘degenerative’ behaviour and defective genes to the next generation (Wessel 2015, 591-9). While it is tempting to tie the 2003 Trans Law to this eugenic history, I argue instead that discourses of sterilisation and castration shifted in the 1970s in a way that trans people were also able to manipulate the new legislation to access surgeries to remove reproductive organs. This also had unforeseen consequences whereby officials conflated the desire for genital surgery with the desire for sterilisation as an essential characteristic of a transsexual. The same legislation also shifted sterilisation away from eugenic goals and tied it to the normalisation of nuclear family life and kinship, and it is this latter norm that I argue also underpins the trans sterilisation requirement.

The eugenic Sterilisation Law of 1935 was amended in 1950 when it became possible for a woman to be voluntarily sterilised if she felt herself incapable of caring for her children, for instance because of her ‘asocial living habits’ (Hemminki et al. 1997, 1877). Forced sterilisation was abolished entirely in 1970, after which it was available only as a form of contraception to women over the age of 30, or women who already had three children.¹⁰ By 1970, the Sterilisation Law therefore had become a means of normalising the nuclear family form and its ideal number of children. By reorienting sterilisation practices around the ability of parents to care for the children and provide them with a ‘social’ home, Finnish sterilisation legislation became underpinned by postwar discourses of ‘good’ and ‘bad’ parenting (Yesilova 2009).

Sexual criminals could still be forcibly castrated under the 1950 Finnish Criminal Act up until the 1970 Castration Law. From 1970 onwards, sex offenders, but also private citizens convicted

¹⁰ Although ‘mentally handicapped’ women could still abort their pregnancies and be sterilised voluntarily if they were worried that their child would also be born with a disability (Hemminki, Rasimus and Forssas 1997, 1877)

of rape and child abuse could be castrated with their consent ‘if there are grounds for supposing that his sexual instincts are causing him serious mental suffering or other harmful effects and these would be diminished by castration’ (Castration Law 1970). The Castration Board, which assessed castration applications, received zero applications from sex criminals during the existence of the law from 1970 to 2003. In the 1970s, however, it received 2 applications for castration from male-to-female (MtF) transsexuals. Lacking criteria with which to assess the applications, they created some when they received a third application in 1980 (of a total of 14 that decade). Among various medical requirements¹¹, the Board demanded that the applicant submit their medical case history relating to their dysphoria, and have undergone psychological and hormonal treatment prior to application, as most applicants already had by the time they approached the Castration Board. Under the administration of the Castration Board, the transsexual was a pathological subject to be treated for their suffering through surgery as a final step in an already advanced stage in the transition process. For MtF transsexuals, the Castration Law was a legal loophole that they could use to gain access to genital surgery.

This also appears to have formed a basis for the state to conflate the transsexual desire for genital surgery with a desire for sterilisation. In the preparatory governmental documents for the Trans Law, state officials seemed to assume that *all* trans people wanted to be sterilised. A working group memo on the status of trans people published in 2000 by the Ministry of Social Affairs and Health stated that ‘the Sterilisation Law should allow for sterilisations carried out in the treatment of transsexuals’ (2000, 16) and therefore that ‘the Sterilisation Law should be changed so that sterilisation is also possible on the basis of transsexualism’ (2000, 35). The

¹¹ The Castration Board stipulated that applicants must have the sexual orientation of the ‘opposite sex’ (i.e. pre-transition same-sex attraction – whereby that homosexuality was taken to be a sign of possible transsexuality), continued psychiatric follow-ups, sufficient mental health reasons for confirming gender identity, a predicted ‘positive outcome’, psychological and hormonal treatment. The applicant also had to make clear that castration was the only way of alleviating deep personal suffering and that there were no other likely causes to their symptoms. (HE, 5)

Castration Law was seen as redundant as it had never been used for its intended purpose of castrating sex criminals. It had only ever been used by transsexuals to access genital surgery, hence, the logic went, the Sterilisation Law should be reformed to ensure trans people with continued access sterilisation once the castration law was abolished. This was reiterated in the 2001 Government Bill, which stated that ‘according to the Sterilisation Law, sterilisation is not possible on the basis that a person wants to become sterile due to their transsexualism’ (HE 56/2001 vp, 10). The use of the castration law by MtF transsexuals seems to have given rise to a general belief that all trans people used it to become sterile, rather than to merely access genital surgery. While genital surgery leads to sterility, government officials collapsed the difference between the two. This matters because not all trans people are transsexuals, not all want genital surgery, or to be sterilised.

In addition to attempting to close a longstanding legislative loophole, sterilisation also functioned to uphold normative kinship relations. As Tey Meadow argues, ‘legal gender classifications are the implementation of a relational construct of gender that privileges the social roles men and women are expected to fulfil, namely, participation in the heterosexual, conjugal family’ (2010, 831-2). In the Finnish case, kinship relations were not explicitly problematised until the 2001 Government Bill for the Trans Law. The Bill and the testimonies of the Ministry of Social Affairs and Health to the Social Affairs and Health Committee, all repeated verbatim that ‘a medical statement of sterility is required, otherwise situations may arise in which a person whose has been confirmed as a woman may father a child, or a person who has been confirmed a man may become pregnant’ (HE 56/2001 vp, 13).¹² This statement was not accompanied by other explanations and was presented as a self-evident conundrum of

¹² Other countries whose gender recognition laws dated back to the 1970s and 1980s, not only Sweden but also Germany, originally also prevented trans people from storing sperm or eggs for future use.

the legal recognition of parentage. This ignored that by law, trans men who gave birth before transition remained the legal mothers of their children even after transition, and that trans women who fathered children prior to transition are still the legal fathers.¹³ Presumably these families nonetheless threatened to destabilise the hierarchical model of sexual complementarity (Lettow 2015, 268) on which notions of ‘good parentage’ as well as demographic futurity were built.

In sum, compulsory sterilisation was instituted in the Trans Law through two rationalisations of power: the verification of trans authenticity, and the imperative to uphold normative kinship relations. The former emerged as a response to the MtF transsexual use of the Castration Law in order to access genital surgery. It shifted the authority of regulating sterility from the Castration Board to the experts in the hospitals in Helsinki and Tampere, which were charged with the task of carrying out the disciplinary assessment of trans personhood, including the certification of sterility. At the same time sterilisation was a material technology through which the government sought to neutralise the threat allegedly posed by trans forms of kinship. In other words, sterilisation was the technology of power by which trans kinship could be governed through its denial.

Conclusion: Cracks in the Disciplinary Architecture?

To reformulate Foucault’s repressive hypothesis on sexuality in the context of the contemporary trans biopolitics, ‘gender identities’ can be said to be repressed by society, but it there is also an overwhelming production of knowledge on ‘gender identity’ like never before.

¹³ In Finland, the parent who gives birth is always legally designated as the mother regardless of their juridical sex. Likewise, the inseminating parent is designated as the father.

At both the governmental level as well as the subjective level, there is a drive to speak the truth about gender identity, to capture its essence, and to both liberate and govern it. It is beyond the scope of this paper to do justice to the myriads of complex discourses of ‘gender identity’ circulating in contemporary discourse. The Finnish Trans Law has been analysed here as a point where some of those discourses converge and become inscribed in liberal and biopolitical practices of governance, rendering trans subjects governable.

In this article, I have sought to analyse the Finnish Trans Law by putting it into its proper political context of the biopolitical architecture of the Finnish welfare state. By reconstructing the problematisations of governance underpinning the Trans Law, the forced sterilisation of trans people appears as a disciplinary technology that produces and regulates political trans personhood in the figure of the transsexual. This governmentalisation of trans personhood involves the translation of recognisability into governability under liberal governmentality: in order to govern trans personhood, it was necessary for the Finnish state to render trans people intelligible through the production of psychiatric knowledge. The political recognition of trans personhood was conferred on the condition of compliance to medico-juridical regulation that sought to produce stable, permanent, and infertile trans subjects. The discourse of equality justified the construction of a regulatory apparatus that made it possible to universally and systematically target the ‘gender identity’ of all trans people seeking treatment. ‘Gender identity’ was therefore deployed as an object of biopower, to examine, assess, and stabilise it, and enshrine it in law as a foundation of ‘true sex.’

Compulsory sterilisation, therefore, can be understood as one of the disciplinary practices through which the Finnish state aims to govern and stabilise ‘gender identity’ and the kinship relations of trans people. On the one hand, it can be seen as a response to the state’s need to

govern trans people as transsexuals who are presumed to desire their own sterility. On the other, it is a material technology of power that aims to neutralise potential forms of parentage that are not deemed compatible with existing legal and normative categories of kinship relations. In other words, sterilisation becomes a means of governing trans kinship relations by attempting to render them impossible.

Like many techniques of biopower, however, the attempt to govern trans kinship through sterilisation, however, failed as soon as it was attempted. Although the Trans Law's policy documents reveal a governmental fear that juridically recognised men can be registered as mothers, this had already been and continues to be a reality. Trans parents who already have children were and are still legally the mothers and fathers of their children, because in Finland motherhood and fatherhood are decreed on the basis of gametes (sperm) and acts (giving birth), not juridical sex. Paradoxically, the government acknowledged this in their bill. Moreover, the Trans Law that does not require the permanent sterility of applicants, so it is possible in some cases for some people to regain their fertility, for instance by ceasing hormone treatment. The law also does not require trans people to destroy their sperm or eggs, making it possible to reproduce in the future with the help of reproductive technologies and surrogates. That in Finland trans people should not be able to reproduce while there is legislation to address situations where it occurs nonetheless, is another example of the way in which disciplinary power over sex/gender/kinship is neither absolute nor totalising, but rather contradictory as it always involves a convergence of various biopolitical discourses of sex. It is in these leaks and cracks where we find subtle forms of resistance to power, born hand-in-hand with the legislation aiming to suppress it.

With the increasing pressure from civil society to reform the Trans Law, these power dynamics can also be expected to be radically altered in the future. Finland's current right-wing coalition government has stated that it does not intend to amend the Trans Law during its current term, therefore much depends on the results of the next parliamentary elections in 2019. While it is difficult to predict what the landscape of power/knowledge will look like should sterilisation and psychiatric diagnosis requirements be abolished and replaced with self-determination, it is worth bearing in mind Foucault's key insight on the omnipresence of power: '[it] is everywhere, not because it embraces everything, but because it comes from everywhere' (Foucault 1981, 93). Although the removal of psychiatric and medical requirements from gender recognition laws is likely to make life easier for those wishing to change their legal sex, the other ways in which it might reconfigure the landscape of power over sex and gender is unclear. In other words, the abolition of sterilisation requirements may displace one form of regulation, but only in the context of a multiplicity of power relations that continue to circulate and shape subjectivities, rationalities and practices. The point, thus, is to grasp the shifting points of both power and resistance. As gender self-determination is already a possibility in other European states such as Denmark, Malta, Ireland and Norway, further research needs to be conducted in order to understand what new rationalities and practices of regulation and normalisation rise to prominence when disciplinary state-sanctioned pre-requisites for recognition are removed. Only then is it possible to grasp what is at stake in the circulation of liberal discourses such as freedom and equality in relation to the production, regulation, and discipline of trans bodies and subjectivities across different regulatory times and contexts.

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